IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 159 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ZHALA JAGDISSINH JAYVANTSINH

Versus

STATE OF GUJARAT

Appearance:

MR DJ BHATT for Petitioner

MR KG SHETH APP for Respondent No. 1

NOTICE SERVED for Respondent No. 2

MR EE SAIYED for Respondent No. 3, 4

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/04/2001

ORAL JUDGEMENT

1. This Revision Application has been filed under Section 397 of the Code of Criminal Procedure, 1973 (for

short "Code"), by the original complainant against the judgement and order recorded by the learned J.M.F.C. at Talaja in Bhavnagar District on 31.12.1997 in Criminal Case No. 48/96, under which the learned Magistrate, dismissed the said complaint of the present petitioner under Section 203 of the Code.

2. The fact may be briefly stated as follows :-

The present petitioner was allegedly taken in custody by the respondents abovenamed for the offence punishable under Sections 186 and 188 of the Indian Penal Code on 25.3.1996 at about 5 p.m. at Talaja. According to his case, he was produced before the learned Magistrate on 26.3.1996 at 6 p.m. It has been contended that offences levelled against him were bailable offence and therefore, he was required to be released on bail by the respondents herein. It is further contended that there was absolutely no reason for the present respondents to detain the present petitioner for a period of 25 hours and therefore, he preferred the aforesaid complaint before the learned Magistrate against the present respondents for the offences punishable under Section 148 of the Bombay Police Act read with Section 114 of the Indian Penal Code.

3. It appears that learned Magistrate passed an order dated 21.9.1996 directing the Magisterial inquiry by the Court itself under Section 202 of the Code. After conclusion of the inquiry, the learned Magistrate passed the aforesaid order on 31st December, 1997 dismissing the complaint of the present petitioner under Section 203 of the Code.

4. Feeling aggrieved by the said order of the learned Magistrate, the petitioner has preferred this Revision Application before this Court. It is mainly contended that the order passed by the learned Magistrate is illegal and therefore, it is required to be quashed and set aside.

5. On receiving the petition, Rule was issued on 27.7.1998. So far the State of Gujarat is concerned, Mr. K.G. Sheth, learned APP appears on behalf of the State of Gujarat. However, remaining respondent no. 2 has been served but nobody appears on his behalf. Mr. E.E. Saiyed, learned advocate is shown to be appearing for respondent Nos. 3 and 4. He was not present in the first session and he was again not present in the second session, when the matter was heard.

6. I therefore, heard the learned advocate for the petitioner and have also heard Mr. K.G. Sheth, learned APP for the State of Gujarat.

7. Now, on going through the complaint of the present petitioner before the trial Court placed at page no. 26, it is clear that the complaint was presented on 21.9.1996 by the present petitioner before the learned Magistrate. The learned Magistrate passed an order that, "read the complaint. Heard the learned advocate. Court Inquiry under Section 202 of the Code, be adjourned on 14.10.1994."

8. This shows that on receiving the complaint, the learned Magistrate had not examined the present petitioner.

9. It is clear that when the learned Magistrate has passed an order for inquiry by the Court under Section 202 of the Code, he has taken cognizance of the offence. Then it is very clear that a cognizance of an offence can be taken only after following the procedure laid down in Section 200 on wards.

10. Section 200 of the Code reads as under :-

" A Magistrate taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate : Provided that, when the complainant is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 :

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

11. On bare reading of this provision contained in

Section 200 of the Code, it is very clear that when a Magistrate takes cognizance of an offence, it is the duty of the Magistrate to first examine the complainant on oath. The Magistrate may examine the witnesses present in the Court but so far the complainant is concerned, it is the obligatory or mandatory duty on the part of the Magistrate to examine upon oath the complainant.

12. In the present case, the learned Magistrate has passed an order for Court inquiry under Section 202 of the Code. This would mean that the learned Magistrate had taken cognizance of the offences against the present respondents. The record shows that the learned Magistrate has taken cognizance without examining the complainant on oath. This would clearly mean that the mandatory provision contained in Section 200 of the Code has not been followed. It is clear that if an order is passed by a Magistrate in violation of the provisions made in Section 200 of the Code, the order is ex-facie illegal and cannot be sustained.

13. Therefore, in the present case also, the learned Magistrate has taken cognizance of the offence against the respondents without examining the present petitioner on oath which is in clear violation of the provisions made in Section 200 of the Code. Therefore, even without going through the merits of the facts of the present complaint and other contentions raised by the petitioner in the revision petition, I am of the opinion that on this solitary ground, the order of the learned Magistrate is required to be quashed and set aside.

14. The learned APP appearing on behalf of the State of Gujarat was not in a position to say that technically, the impugned order is legal on the face of it. Respondent no. 2 had not appeared and the learned advocate appearing for the respondent Nos. 3 and 4 has not appeared and therefore, I do not have a benefit of hearing him with respect to the aforesaid technical illegality committed by the learned Magistrate while passing the order dismissing the complaint of the present petitioner under Section 203 of the Code.

15. In view of the aforesaid clear illegality, there is no alternative but to quash and set aside the said order of the learned Magistrate. Then the next order to be passed would be to remand the matter back to the Trail Court for considering the complaint as it is, as if previous order of the court inquiry under Section 202 of the Code had not been passed at all.

16. For the foregoing reasons, this Criminal Revision Application is allowed. The order of the learned Magistrate dated 31.12.1997 dismissing the complaint of the present petitioner u/s. 203 of the Code is ordered to be set aside. The matter is remanded back to the learned Magistrate for proceeding ahead according to law with respect to the complaint of the present petitioner in light of the back ground of the observations made hereinabove. Rule made absolute to that extent.

(D.P. Buch, J.)

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